LIBRARY
SUPREME COURT, U. S.

FILED
NOV 16 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

..... TERM, 196....

No. 753

LYNN PORTER, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

KALE R. ALEXANDER,
DAVID A. FEDOR,
1412 Bull Street,
Columbia, South Carolina 29201,
Attorneys for Petitioner.

Of Counsel:
BETTY M. SLOAN,
1316 Washington St.,
Columbia, South Carolina.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

PAGE

Jurisdiction 1

Questions Involved 2

Statement 3

Reasons for Granting the Writ:

I. The Petitioner was denied due process of law, guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States, by the receipt as evidence of various alleged gambling paraphernalia, seized from the petitioner's residence by police officers without his consent or permission and without the existence or possession of a Search Warrant 4

II. The Petitioner was denied due process of law, guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States, by the receipt as evidence of statements allegedly made by the petitioner at the time of his arrest, when it was admitted by the State of South Carolina that the arresting officers, at no time, advised petitioner of his right to remain silent and/or to have present an attorney prior to questioning 10

III. The Petitioner was denied due process of law and equal protection of the law, guaranteed by the Fourteenth Amendment to the Constitution of the United States by the failure of the trial judge to charge the jury the law relative to entrapment, when there was evidence before the Court that there has been an entrapment of the petitioner by the police officers 12

Summary 14

Conclusion 15

AUTHORITIES CITED

Cases: PAGE

Gadlin v. U. S., 326 Fed. (2d) 666 9

Higgins v. U. S., 209 Fed. (2d) 819 6

Johnson v. U. S., 333 U. S. 10 7

Judd v. U. S., 190 Fed. (2d) 649 7

Mapp v. Ohio, 367 U. S. 643 6

Miranda v. Arizona, 284 U. S. 436 11

State v. Rippey, 123 S. C. 550 13

State v. Jacobs, 238 S. C. 234 13

U. S. v. Como, 340 Fed. (2d) 891 6

U. S. v. Landrip, 74 Fed. Supp. 946 8

U. S. v. Marra, 40 Fed. (2d) 271 7

U. S. v. Slusser, 270 Fed. 818 8

Weed v. U. S., 340 Fed. (2d) 827 .....6, 8

Statutes, Etc.:

Title 28, U. S. Code, Sec. 1257 (3) 2

Supreme Court of the United States

..... TERM, 196....

No. .....

LYNN PORTER, PETITIONER,

versus

STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in the above entitled case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported at .....

JURISDICTION

The judgment of the Court of General Sessions of Greenville County South Carolina was affirmed by the Supreme Court of the State of South Carolina on August 13,

1968. Re-hearing was denied August 29, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3), petitioner having asserted in the Courts below rights, privileges and immunities conferred by the Constitution of the United States of America.

QUESTIONS INVOLVED

I

Whether due process of law and the right to be secure against unreasonable search and seizures, as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution was denied petitioner by the receipt as evidence of various alleged gambling paraphernalia obtained from petitioner's residence by police officers without his consent or permission and without having in their possession a Search Warrant.

II

Whether due process of law, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution was denied petitioner by receipt as evidence against him of statements allegedly made by the petitioner at the time of his arrest, when it was admitted by the State that the arresting officers, at no time advised petitioner of his right to remain silent and/or to have present an attorney.

III

Whether due process of law, as guaranteed by the Fourteenth Amendment was denied petitioner by the failure of the trial Court to charge the law relative to "entrapment" when there was evidence before the jury and the Court that there had been an entrapment of the petitioner by the police officers.

STATEMENT OF CASE

This action originated in Greenville County South Carolina. The defendant (petitioner herein), his wife and several children resided in a private dwelling just outside of the City of Greenville. On December 31, 1965, the petitioner was in his residence with his wife and children when officers of the State Law Enforcement Division and officers of the Greenville County Sheriff's Department, knocked at the door of the residence. The petitioner answered the door and was told that the police wanted in. He asked the officers if they had a Search Warrant and was told that they had none. The officers then informed him that they had an Arrest Warrant and that he was under arrest. They entered the residence and, according to the officers, asked permission to search. Whether permission was verbally given or not, the officers did search the premises and the personal effects of the petitioner's wife. They seized a large quantity of alleged evidence and took money from the pocketbook of petitioner's wife. Both the seized physical evidence and the money was later introduced against the petitioner, over petitioner's objection. It was admitted by the police officers that there was no Search Warrant; that they did not advise the petitioner of his right to remain silent; that they questioned him without his attorneys being present; and did not advise him of his right to have an attorney present.

Upon the trial of the matter and at the completion of the State's case, all appropriate Motions were made and refused by the Court. The petitioner offered no testimony or evidence in his own behalf. He was found guilty. Appropriate Motions for a new trial and for a setting aside of the verdict were made and refused. An Appeal was taken to the South Carolina Supreme Court on the questions presented herein and other questions of law. The conviction was affirmed and Re-hearing was denied.

REASONS FOR GRANTING THE WRIT

I

THE PETITIONER WAS DENIED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES, BY THE RECEIPT AS EVIDENCE OF VARIOUS ALLEGED GAMBLING PARAPHERNALIA, SEIZED FROM THE PETITIONER'S RESIDENCE BY POLICE OFFICERS WITHOUT HIS CONSENT OR PERMISSION AND WITHOUT THE EXISTENCE OR POSSESSION OF A SEARCH WARRANT.

The police officers, five (5) in number, appeared at the residence of the petitioner on December 31, 1965. They knocked on the door and when petitioner appeared he was advised that the officers had an Arrest Warrant and that he was under arrest. Then according to the police officers, the petitioner was asked if they could "look around". They entered the premises, searched the petitioner's wife, from whom they secured some money, later introduced as evidence, and from different parts of the house, seized notes, blank betting cards on sports and other such alleged gambling paraphernalia.

During the course of the trial, all of the State's witnesses admitted that no Search Warrant was issued and that none was sought, all of the participating officers agreed on this basic fact. The chief arresting officer was Greenville County Chief Deputy Sheriff Bill Coleman. When being cross examined as to the arrest itself (Tr., p. 51) Chief Coleman testified as follows:

"Q. You knew exactly what you were looking for, did you not?

A. Yes, sir.

Q. Did you make the statement—did I understand you correctly to say you went out to Mr. Porter's house to serve a warrant and quote "see what evidence we could pick up at the house?"

A. Yes, sir.

Q. You are an experienced officer?

A. Well, I've been on the force about ten and a half years.

Q. You've had occasion to make any arrests, have you not?

A. Yes, sir.

Q. You knew exactly what you were going up there to pick up?

A. I knew we were hunting gambling paraphernalia.

Q. At no time did you have a search warrant, did you?

A. No, sir."

What this witness said, without equivocation, is that they used the Arrest Warrant for the specific purpose of securing physical evidence from the search of the defendant's residence, while having no search warrant and knowing that they had no search warrant. He used the arrest as a subterfuge for the illegal procurement of evidence.

The plain fact is, as is evident from reading the transcript of this trial, that the officers having no evidence whatsoever, secured an Arrest Warrant, used the warrant itself as an illegal method of securing the evidence which they needed in order to convict this defendant. The defendant would not have been convicted without the introduction of this evidence. The State relied upon the additional ground, in order to make legal the illegal search, that the defendant gave consent to the search. This is obvious nonsense. The State Officers came to the door of the residence of the defendant and notified him that he was under arrest. He asked for a Search Warrant and was told that they had none, but that he was under arrest. At this point, it is con-

tended by the State that the defendant was asked if they could look around his house and the defendant said for them to help themselves (Tr., p. 29). At no time was this defendant advised of his constitutional rights, even though under arrest. Objection was made to all of this line of testimony and to the admissibility of evidence obtained in the method in which it was obtained (Tr., pp. 29-31).

The Federal Courts of the United States, and more particularly, the United States Court, have found numerous occasions in recent years, to pass upon this problem. The Supreme Court, the Courts of Appeal and the District Courts have uniformly held that where the evidence is the fruits of an illegal search, the evidence is totally inadmissible. *Mapp v. Ohio,* 367 U. S. 643; *U. S. v. Como,* 340 Fed. eral (2d) 891; *Weed v. U. S.,* 340 Federal (2d) 827

The cases involving this type of a search, upon these grounds are numerous. *Higgins v. U. S.,* 209 Fed. (2d) 819, involved a case where drugs were seized in the defendant's room, without a warrant. The officers asked the defendant if they could look around his room and the defendant said they could and were welcome to. The Court assumed, for purposes of argument, that this was, in fact, true, but held:

> "Even so, we think the record does not support finding that appellant consented to the search."
>
> "Words or acts that would show consent in some circumstances do not show it in others. Nonresistance to the orders or suggestions of the police is not infrequent; true consent, free of fear or pressure, is not so readily to be found."
>
> "If a valid confession proceeds a search by police, permission may show true consent to the search. But no sane man, who denies his guilt would actually be willing that policemen search his room, for contraband, which is certain to be discovered. It follows that when police identify themselves as such, search a room and find contraband in it, the occupants words or signs of

acquiescence in the search, accompanied by the denial of guilt do not show consent."

In *Johnson v. U. S.*, 333 U. S. 10, 68 U. S. Sp. Ct. 267, officers obtained entry to a defendant's residence under the color of their office. The Court held that the fruits of such a search were not admissible and went on to say:

> "Entry to a defendant's living quarters, which was the beginning of the search, was demanded under the color of office. It was granted in submission of authority rather than as an understanding and intentional waiver of a constitutional right."

In *Judd v. U. S.*, 190 Fed. (2d) 649, the Court dealt with an identical question and held:

> "The government must show a consent that is unequivocal and specific, freely and intelligently given. Thus, 'invitations' to enter one's house extended to armed officers of the law, who demand entrance are usually to be considered as invitations secured by force. A like view has been taken where an officer displays his badge and declares that he has come to make a search even where the householder replied 'all right.'" (*U. S. v. Marra,* 40 Fed. (2d) 271.)
>
> "This burden on the Government is particularly heavy in cases where the individual is under arrest. Nonresistance to the Orders of suggestion of the police is not infrequent in such a situation; true consent, free of fear of pressure, is not so easily found. In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent not in accordance with human experience and explainable only on the basis of physical or moral compulsion."

In *U. S. v. Marra,* 40 Fed. (2d) 271, the Court held:

> "Under the facts in this case, I find that there was no invitation given by the defendant to the prohibition officers to search the premises. The statement of the officer to the defendant, on presenting themselves at the door, that they were officers and were going to inspect the premises and the reply of the defendant, 'all

right', might be said to be acquiescence, but under the circumstances did not amount to an invitation to enter and search."

An interesting parallel case to the instant case is that of *U. S. v. Lantrip,* 74 Fed. Supp. 946. This case had an identical problem with that in *U. S. Slusser,* 270 Fed. 818, and said:

> "The case of *U. S. v. Slusser,* 270 Fed. 818, is in point. Prohibition officers and two city policemen went to the defendant's residence, knocked and were admitted. One of the officers displayed his badge and said that they were there to look for liquor. Slusser said: 'all right, go ahead'. Certain bottles for whiskey were found. The officers had no search warrant. The Court held the search to be an illegal one and that the so-called consent given did not amount to a waiver of his constitutional rights, but on the contrary, should be attributed to a peaceful submission to officers of the law."
>
> "It is said that if such arrests and searches cannot be made, law enforcement will be more difficult. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveilance, which they seemed to think was a greater danger to free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

Weed v. U. S., 340 Fed. (2d) 827, contained an interesting discussion on the defendant being in custody at the time he allegedly gave consent:

> "Suffice it to say that every reasonable presumption is against an accused's waiver of his constitutional rights, particularly when he is in **custody,** and the consent must be specific, unequivocal and freely and intelligently given. Particular words of consent

must always be weighed in light of the atmosphere and and totally of circumstances in which they are spoken in order to determine the intent and voluntariness of the words."

Gadlin v. U. S., 326 Fed. (2d) 666, held:

"Invitations to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force."

A United States case decided July 31, 1967, *U. S. v. Shropshire,* had an identical question where the police entered the residence and requested permission to search. Shropshire allegedly granted permission, saying "go right ahead". The search uncovered a number of counterfeit twenty dollar bills and the Court held that it was incredible to think that Shropshire would have voluntarily consented to a search which he knew would disclose incriminating evidence. His words should be considered to be an involuntary submission to authority and insufficient to waive a constitutional right.

The identical questions decided above are present in the instant case. The burden was upon the State to prove consent and they failed to do so. The search, in fact, did turn up evidence which the State relies upon as "gambling paraphernalia". The officers of the State after having arrested the defendant, in his own residence, and without warning him of his constitutional rights, asked to search the premises. It is completely unbelievable that Porter would have consented to this search, knowing that evidence was in the house. It is contended therefore, that all of the testimony concerning the alleged seized evidence and the evidence seized was inadmissible in evidence.

II

THE PETITIONER WAS DENIED DUE PROCESS OF LAW, GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, BY THE RECEIPT AS EVIDENCE OF STATEMENTS ALLEGEDLY MADE BY THE PETITIONER AT THE TIME OF HIS ARREST, WHEN IT WAS ADMITTED BY THE STATE OF SOUTH CAROLINA THAT THE ARRESTING OFFICERS, AT NO TIME, ADVISED PETITIONER OF HIS RIGHT TO REMAIN SILENT AND/OR TO HAVE PRESENT AN ATTORNEY PRIOR TO QUESTIONING.

The State of South Carolina based its' right to search the residence of the petitioner on a statement allegedly made by the petitioner immediately after his arrest. Police Officer Shirley was allowed to testify at length as to remarks made by the petitioner. A full objection to such remarks and the testimony concerning the remarks was made by the petitioner on the ground that the State had not established that the petitioner had been advised of his constitutional right not to speak or not to cooperate, but the testimony was admitted.

"Q. Did you place him under arrest right at the front door?

A. It was inside—we were inside after he unlocked the door.

Q. Did you at that time advise him of his constitutional rights to remain silent, or call an attorney?

A. I did not, no, sir.

Q. Did any of the officers?

A. Not to my knowledge.

Q. Then you tell us that Porter just said, 'Go ahead and search the premises', what exactly did he say?

A. Lieutenant Coleman told him we'd like to look around and he said, 'Help yourself', or 'Go ahead'."

Chief Greenville County Deputy Sheriff Bill Coleman removed any doubt as to whether or not the petitioner was advised of his rights when upon cross examination he testified as follows:

"Q. When you finally gained admittance you place Porter under arrest at that time?

A. Yes, sir.

Q. Did you then advise him of his constitutional rights?

A. Not at that time.

Q. When did you so advise him? At the Sheriff's Office?

A. I didn't advise him at any time. He was brought up to the Sheriff's and I didn't talk to him much after that.

Q. But you placed him under arrest?

A. Yes, sir."

Miranda v. Arizona, 284 U. S. 436, is clearly controlling on this point. Almost all, if not all, constitutional protections for the citizen can be waived. Waiver doctrine also applies to the right of counsel or to the right to remain silent. But the waiver doctrine rests firmly upon the principle that the man must first be advised of his rights. The record in the instant case is repleat with proof that at no time was the petitioner advised of these rights. The State of South Carolina rested its right to make the search and seizure upon a statement made by the petitioner when admittedly they failed to advise him of his right to not make the statement or to authorize the search, either expressly or impliedly. The admissibility of the evidence seized by the State rested upon whether or not he had consented to the search. If the statements themselves were not admissible, then the objects seized would not have been admissible because they would then have been patently the fruits of an illegal search and seizure. The petitioner was thus denied due process and equal protection of the law.

III

THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW, GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY THE FAILURE OF THE TRIAL JUDGE TO CHARGE THE JURY THE LAW RELATIVE TO ENTRAPMENT, WHEN THERE WAS EVIDENCE BEFORE THE COURT THAT THERE HAS BEEN AN ENTRAPMENT OF THE PETITIONER BY THE POLICE OFFICERS.

At the close of the trial in the State Court, and prior to the Judge's charge, petitioner requested that the Court charge the law of the State of South Carolina relating to entrapment. The Chief witness for the State, State Law Enforcement Division agent Ted M. Owens, testified that he had called the petitioner to place an illegal wager. He did not know, nor had he seen the petitioner prior to December 31, 1965. He testified however, that on September 14, 1965, he called a telephone number in Greenville, South Carolina and spoke with a man with the same name as petitioner. It was established, upon cross examination of this witness that he had initiated the betting process about which he was testifying. The pertinent part of his testimony is, as follows:

> Q. In fact, the purpose of your calling was to get the person at that telephone, who you now identify as Lynn Porter, to accept an illegal bet from you, is that correct?
>
> A. Yes, sir, he accepted it, yes, sir.
>
> Q. You knew at that time that it was illegal to wager or to accept wagers, is that correct?
>
> A. Yes, sir.
>
> Q. It is equally as illegal to bet as it is to accept a bet?
>
> A. Phrase that again.

Q. It is equally as illegal to bet or wager as it is to accept a bet or wager?

A. I would say so, yes, sir.

Q. And the purpose of your calling him was to get him to accept an illegal bet?

A. I called him to accept the bets, see if he would, yes, sir.

Q. And you urged him to, didn't you?

A. No, sir, I did not.

Q. Well, you asked him would he accept a bet, didn't you?

A. Yes, I told him I wanted to bet on his games, yes, sir.

Q. And did he at first refuse?

A. He said, "Wait a minute and I'll call you back," yes, sir.

Q. So at first he refused. He called you back and you told him again you wanted to place a bet, and this time he accepted it, is this right?

A. That's right, yes, sir.

The gist of Owens' testimony is that he persuaded the petitioner to accept a wager after the petitioner had at first refused to do so. It is the contention of the petitioner that such testimony was ample to entitle the petitioner to the requested charge of entrapment. Entrapment in the State of South Carolina has been defined in *State v. Rippey,* 123 S. C. 550, 122 S. E. 397, and *State v. Jacobs,* 238 S. C. 234 and 119 S. E. (2d) 735. Such definition is: "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer."

Whether or not there was entrapment was a question for the jury and petitioner was entitled to such a charge. The refusal to make such charge to the jury deprived the petitioner of due process of law and equal enforcement of law.

SUMMARY

The questions herein presented are of obvious importance to the administration of justice and the conduct of criminal investigation. The record of this case clearly shows a violation of due process in several areas of the proceedings and these departures from due process go to the very heart of the fundamental foundation required in the conduct of criminal justice. The decision of the Court below is believed to be erroneous. The petitioner has asserted in the Courts below, and is asserting here, rights guaranteed to the petitioner by the Constitution of the United States of America and is. of the opinion that he has shown violations of these rights. It is obvious from the record that the petitioner would not have been convicted, had illegally seized evidence not been admitted into evidence. It is also obvious that this evidence was secured by the State Police in violation of the rights and guarantees afforded petitioner by the United States Constitution. Unless Certiorari is granted by this Court, the rights of petitioner will stand as violated and this can only be remedied by this Court applying its standard of measurement to the illegal evidence used against him in the Courts below. The establishment of uniform requirements of due process to insure proper ajudication of criminal justice in State criminal trials warrants remedial action by this Court.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

KALE R. ALEXANDER,
DAVID A. FEDOR,
1412 Bull Street,
Columbia, South Carolina 29201,
Attorneys for Petitioner.

----------, 1968.

Of Counsel:

BETTY M. SLOAN,
1316 Washington St.,
Columbia, South Carolina.

INDEX TO APPENDIX

PAGE

Opinion Supreme Court of South Carolina 19

Petition for Re-Hearing 26

Order Denying Re-Hearing 27

THE STATE OF SOUTH CAROLINA

In The Supreme Court

THE STATE, Respondent,

versus

LYNN PORTER, Appellant

APPEAL FROM GREENVILLE COUNTY

Wade S. Weatherford, Jr., Judge

Opinion No. 18818

Filed August 13, 1968

AFFIRMED

Kale R. Alexander and David A. Fedor, both of Columbia, for appellant. Solicitor B. O. Thomason, Jr., of Greenville, for respondent.

LEWIS, A. J.: The defendant was tried and convicted under an indictment which charged the violation of Section 16-515 (2) of the 1962 Code of Laws. This section makes it a misdemeanor to occupy a room or building in this State "with books, papers, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools." Defendant has appealed upon exceptions which relate to (1) alleged error in the admission of testimony and (2) the refusal to instruct the jury as to the law of entrapment. The defendant contends under the first that without the challenged testimony there was no evidence to

sustain his conviction and the trial judge should have granted defendant's timely motion for a directed verdict. Under the second it is argued, alternatively, that the alleged error in the charge to the jury entitled defendant to a new trial in any event. We find no error in the rulings of the trial judge with reference to the admissibility of the challenged testimony nor in the refusal to instruct the jury as to the law of entrapment.

The defendant, with his wife and children, resided in a private dwelling located on Cliffside Drive, Greenville, South Carolina. The house had a basement consisting of at least two rooms. The offense charged against defendant allegedly took place in this dwelling.

It appears that during the latter part of August, 1965 Mr. Ted Owens, an officer of the South Carolina Law Enforcement Division, was assigned by his superiors to investigate certain reported gambling activities in Greenville County. In the course of his investigation the officer obtained a telephone number through which, reportedly, wagers or bets on baseball and football games could be placed. This number was not listed in the name of defendant. On September 14, 1965, the officer called the telephone number and an individual who gave his name as Lynn Porter, the defendant, answered. A bet was placed with this person and, according to his instructions, the officer left the money at the motel desk where he was staying so that it could be picked up by the one taking the bet. He testified that he talked with this same individual over the telephone at least once each week from the original contact on September 14, 1965 until the defendant was arrested on December 31, 1965. The last telephone conversation by the officer with this party was approximately 15 or 20 minutes before the defendant's arrest. The officer had never seen the defendant until the arrest but, from a comparison of the telephone voice with that of the defendant in person, he testified at the trial that the telephone voice, with which he conversed weekly from September 14th to December 31st, was that of the defendant Lynn Porter. The foregoing identification of the defendant was permitted over defendant's objection and presents the first question for decision.

It is a matter of common knowledge that a person may be recognized and identified by his voice; and, accordingly, a telephone conversation between a witness and another person is admissible in evidence if the identity of the person with whom the witness was speaking is first satisfactorily established. *Cohen v. Standard Accident Insurance Co.*, 194 S. C. 533, 9 S. E. (2d) 222; 29 Am. Jur. (2d), Evidence, Sections 368 and 381; 31A C. J. S., Evidence, Section 188; Annotations: 71 A. L. R. 5, 105 A. L. R. 326.

It is recognized that the identity of the person with whom it is claimed a telephone conversation is had may be established either by testimony that the witness recognized the voice of the other party, *Gilliland & Gaffney v. Southern Railway*, 85 S. C. 26, 67 S. E. 20, or by other circumstances. 29 Am. Jur. (2d), Evidence, Section 383.

The identity of the party with whom the witness talked need not be known at the time of the conversation; but it is sufficient if the knowledge which enabled the witness to identify the other party was obtained later. 29 Am. Jur. (2d), Evidence, Section 381. Accordingly, it has been held proper to permit a witness to testify as to a telephone conversation with a man whose voice he subsequently recognized as the voice of the defendant. *Morgan v. Brinkhoff*, Colo., 358 P. (2d) 43. See: 71 A. L. R. 35; 100 A. L. R. 333.

In this case, the witness heard the telephone voice at least once each week for a period of approximately sixteen weeks and within approximately fifteen or twenty minutes after the last telephone conversation heard the defendant speak in person. Upon the basis of a comparison of the telephone voice with that of defendant, the witness positively identified the defendant as the one with whom he had been talking and placing bets over the telephone. We think that the basis for comparison of the telephone voice with that of defendant was sufficient to sustain the competency of the tesimony.

Defendant was arrested on December 31, 1965, at his residence. When the officers arrived at the residence of the defendant, his wife first came to the door but went back into the house without letting the officers in. In response to a second knock, the defendant then came to the door and

inquired as to whether the officers had a search warrant. Upon being told that the officers did not have a search warrant but did have an arrest warrant, defendant unlocked the door and the officers entered the house. After the arrest warrant was read to the defendant, he was told that the officers "wanted to look around," to which he replied, "Go ahead" or "Help yourself." The house, including the basement, was then immediately searched for gambling paraphernalia. In one of the basement rooms, described as a den or playroom, there was located a telephone with four or five incoming lines operated by pushbottons. In addition, there was found in the basement rooms, basketball, baseball and football parlay cards, dice, playing cards, and books showing figures and scores on basketball and football games. The foregoing items were taken by the officers and later introduced in evidence at the trial over defendant's objection. He contends that, since the officers did not have a search warrant, the articles were obtained as a result of an unlawful search and were inadmissible under the rule announced in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081, 81 S. Ct. 1684.

While the inquiry of the defendant as to a search warrant and his subsequent statement to the officers to go ahead and look around, amply support a finding, as contended by the State, that the defendant thereby consented to the search, we think there is another principle, assuming there was no consent, which makes the exclusionary rule in *Mapp* clearly inapplicable here. It was thus stated in the case of *State v. Swilling*, 249 S. C. 541, 155 S. E. (2d) 607, quoting from 47 Am. Jur., Searches and Seizures, Section 19 (Cumulative Supplement):

> "When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. The right to search and seize incident to a lawful arrest and without a warrant extends to things under the accused's immediate control and, to an extent depending on the circumstances of the case, to the place where he is arrested."

The articles in question were obtained without a search warrant, but incidents to a lawful arrest, from the place where defendant was arrested and where it was charged that the unlawful gambling activities were carried on. The house was under defendant's control and the search was confined solely to implements used in the commission of the crime. Under these circumstances, the search of the residence of defendant was not unlawful so as to make inadmissible the articles so obtained. *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. There will be found an excellent annotation in 19 A. L. R. (3d) 727 in which recent cases are collected dealing with the validity of nonconsensual searches and seizures conducted without a search warrant following a lawful arrest.

The defendant contends, however, that his arrest was unlawful because made under an invalid arrest warrant. He argues that the arrest warrant was invalid because the information in the possession of the magistrate was insufficient to support its issuance. There is no merit in this contention. The warrant was issued upon an affidavit signed by Officer Owens "upon information and belief" that the defendant unlawfully occupied a house in which he kept paraphernalia for the purpose of registering bets, wagers or selling pools in violation of Section 16-515 (2) of the 1962 Code of Laws.

The warrant plainly and substantially set forth the offense charged, upon the information and belief of the officer signing the affidavit. This constituted a valid arrest warrant, *Town of Mayesville v. Clamp,* 149 S. C. 346, 147 S. E. 455, and the arrest of the defendant thereunder was a lawful arrest.

The defendant next contends that the trial court committed error in permitting witnesses to characterize the articles taken from defendant's home as gambling equipment. There is no merit in this position. The question is confined by defendant to two incidents during the trial. The first was a reference made by one witness to certain books or papers in evidence as containing "odds and scores" on ball games. Upon objection by defendant this testimony was stricken from the record and the court appropriately

instructed the jury to disregard it. The other incident did not characterize the evidence but only related to a question asked defendant's wife by the witness in the presence of the defendant at the time of his arrest. Defendant's wife was asked if "she had any parlay cards or anything pertaining to the gambling equipment, or money," in her pocketbook. Objection was made to the reference to "gambling equipment." It was then explained that the testimony in no way characterized any of the physical evidence but related a conversation which preceded obtaining the money hereafter referred to. No prejudice from either incident is shown.

The defendant also contends that the trial judge erred in admitting in evidence certain United States currency consisting of two (2) twenty dollar bills, two (2) five dollar bills, and four (4) one dollar bills, because the money was not properly identified and connected with defendant. Officer Owens testified that he placed a bet with defendant several days before defendant's arrest and mailed currency in the above denominations to him at his residence to cover the bet. Before mailing the money a list was made of the serial numbers appearing thereon. When the defendant was arrested, his wife was present and she turned over to the officers money which she had in her pocketbook. The money was examined and the officers testified that the money mailed by Owens to the defendant was among that obtained from defendant's wife. Another officer testified that the serial numbers on the money turned over by defendant's wife matched those which had been previously listed by Owens.

The money was sufficiently identified and connected with the defendant to justify its admission in evidence. It is true that the specific serial numbers taken by Officer Owens were not placed in evidence but this was not necessary in view of the positive identification by him. It is apparent from the testimony that his identification was made from a comparison of the serial numbers which he had taken down with those on the money in question. The fact that he did not place in the record the serial numbers previously listed by him did not affect the admissibility of the

evidence. Neither is there any merit in the contention that the money was not connected with the defendant. Officer Owens testified that a few minutes before defendant was arrested he had a telephone conversation with defendant in which he admitted that he had received the money mailed by Owens. Defendant and his wife were living together and at the time of his arrest and in his presence the money in question was obtained from his wife. The connection of the defendant with the money was amply established to render it admissible in evidence.

Next, defendant takes the position that testimony as to the taking of bets and wagers by him from Officer Owens was irrelevant and inadmissible to prove the charge against him. Defendant was charged with occupying a house with equipment "for the purpose of recording or registering bets or wagers or of selling pools." Numerous books and papers were introduced in evidence which were capable of being used in gambling activities. The testimony of Officer Owens was to the effect that he had placed bets with defendant over a period of several months. The defendant says that this testimony as to his gambling activities was improperly admitted since he was not charged with gambling. He was however charged with keeping equipment for the purpose of gambling. Testimony that defendant was actually engaged in gambling activities was highly relevant to show his purpose in keeping the equipment and was properly admitted in evidence.

Finally, the defendant contends that the trial judge committed error in refusing to instruct the jury as to the law of entrapment.

We have defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." *State v. Jacobs*, 238 S. C. 234, 119 S. E. (2d) 735.

The record contains no evidence to sustain defendant's claim of entrapment and the trial judge properly refused to instruct the jury as to such defense. The contacts of the officer with the defendant were made exclusively over the telephone. The defendant was not persuaded or lured. He

acted on his own volition and was "simply caught in his own devices." 21 Am. Jur. (2d), Criminal Law, Section 144, page 214.

All exceptions are overruled and the judgment is affirmed.

Moss, C. J., Bussey, Brailsford and Littlejohn, JJ., concur.

PETITION FOR RE-HEARING

Your petitioners would respectfully show the Court:

1. That this action is an Appeal from Greenville County, South Carolina, the Judgment of the lower court being affirmed by this Court in Opinion No. 18818, filed August 13, 1968.

2. That petitioners would show that the Court overlooked and/or misapprehended certain questions presented by such Appeal, which are as follows:

(a) Did the physical evidence presented by the Court qualify as "gambling paraphernalia"?

(b) Did the trial court err in failing and refusing to direct a verdict of Not Guilty?

(c) Did the trial court err in refusing to charge the law of entrapment?

3. The petitioners respectfully submit that the above entitled matter should be reheard on the grounds that the Court overlooked and/or misapprehended such points.

Respectfully submitted,

s/ KALE R. ALEXANDER,
s/ DAVID A. FEDOR,
Attorneys for Defendant-Appellant,
Columbia, South Carolina.

Columbia, South Carolina,
August 19th, 1968.

CERTIFICATE

This is to certify that I, a member of the Richland County South Carolina Bar, not concerned in this action, have examined the record herein and in my opinion, there is merit in the above Petition.

s/ TAYLOR B. RION, JR.

August 19, 1968,
Columbia South Carolina.

THE SUPREME COURT OF SOUTH CAROLINA

Auiust 29, 1968

David A. Fedor, Esquire
1421 Bull Street
Columbia, Couth Carolina

Re: The State v. Lynn Porter

Dear Mr. Fedor:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition denied.

s/ JOSEPH R. MOSS	C. J.
s/ J. WOODROW LEWIS	A. J.
s/ THOS. P. BUSSEY	A. J.
s/ J. M. BRAILSFORD	A. J.
s/ BRUCE LITTLEJOHN	A. J.

The remittitur is being sent down today.

Very truly yours,

FRANCES H. SMITH,
Clerk.

FHS:de

CC: Solicitor B. O. Thomason, Jr.
County Court House
Greenville, South Carolina

SUPREME COURT, U. S.

Supreme Court of The United States

October Term, 1968

No. 753

LYNN PORTER, *Petitioner*

against

STATE OF SOUTH CAROLINA, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

B. O. Thomason, Jr., *Solicitor*
Thirteenth Judicial Circuit of
The State of South Carolina

H. F. Partee
Assistant Solicitor
Counsel for The State of
South Carolina

INDEX

Statement of Facts 1
Questions Involved 3
Argument 4
Conclusion 9

CITATIONS

State vs. Porter, S. C. ; 162 S. E. 2d 843 5

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. (2d) 1081, 81 S. Ct. 1684 5

State vs. Swilling, 249 S. C. 541, 155 S. E. (2d) 607 5

47 *Am. Jr., Searches and Seizures, Section* 19 (*Cumulative Supplement*) 5

Harris vs. United States, 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 6

19 A. L. R. (3d) 727 6

Ker vs. California, 374 U. S. 42, 10 L. E. (2) 743, 83 S. Ct. 1643 6

Miranda vs. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed 2nd 694 7

People vs. Chaddock, 57 *California Reporter* 582 7

State vs. Jacobs, 238 S. C. 234, 119 S. E. 2d 735 8

Supreme Court of The United States

October Term, 1968

No. 753

LYNN PORTER, *Petitioner*

against

STATE OF SOUTH CAROLINA, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF FACTS

This action originated in Greenville County, South Carolina. During the latter part of August, 1965, Mr. Ted Owens, an officer of the South Carolina Law Enforcement Division, was assigned to investigate reported gambling activities in Greenville County. The officer obtained a telephone number through which, reportedly, wagers or bets on baseball and football games could be placed. This number was not listed in the name of the defendant. On October 14, 1965, the officer called the telephone number and an individual who gave his name as Lynn Porter, the defendant, answered. The officer attempted to make a bet with the defendant. The defendant said he would have to call him back. The defendant called the officer and a bet was placed with the requirement that the money be left at the motel desk where the officer was staying so that it could be picked up by the one taking the bet. The officer made bets with this same person in this way

at least once each week from September 14, 1965 until the defendant was arrested on December 31, 1965. The last tele - phone conversation by the officer to this party was approximately fifteen (15) or twenty (20) minutes before the defendant's arrest. The officer had never seen the defendant until the arrest but, from a comparison of the telephone voice with that of the defendant in person, he testified at the trial that the telephone voice was that of the defendant, Lynn Porter.

The defendant was arrested on December 31, 1965, at his residence. When the officers arrived, his wife first came to the door but went back into the house without letting the officers in. In response to a second knock, the defendant then came to the door and inquired as to whether the officers had a search warrant. Upon being told that the officers did not have a search warrant but did have an arrest warrant, the defendant unlocked the door and the officers entered the house. After the arrest warrant was read to the defendant, he was told that the officers "wanted to look around", to which he replied, "Go ahead" or "Help yourself". The house, including the basement, was then immediately searched for gambling paraphernalia. In one of the basement rooms, described as a den or play room, there was located a telephone with four (4) or five (5) incoming lines operated by pushbuttons. In addition, there was found in the basement rooms basketball, baseball and football parlay cards, dice, playing cards and books showing figures and scores of basketball and football games. During this search one of the officers requested that the defendant's wife turn over to him money in her handbag, which she did. This was "marked money" used in placing one of the bets and was introduced at the trial.

At the trial, the Petitioner offered no testimony or evidence in his behalf and was found guilty. An Appeal was taken to the South Carolina Supreme Court on the questions presented herein and the conviction was affirmed and rehearing was denied.

QUESTIONS INVOLVED

I

Whether due process of law and the right to be secure against unreasonable search and seizures, as guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution was denied petitioner by the receipt as evidence of various alleged gambling paraphernalia obtained from petitioner's residence by police officers without his consent or permission and without having in their possession a Search Warrant.

II

Whether due process of law, guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution was denied petitioner by receipt as evidence against him of statements allegedly made by the petitioner at the time of his arrest, when it was admitted by the State that the arresting officers, at no time advised petitioner of his right to remain silent and/or to have present an attorney.

III

Whether due process of law, as guaranteed by the Fourteenth Amendment was denied petitioner by the failure of the Trial Court to charge the law relative to "entrapment" when there was evidence before the jury and the Court that there had been an entrapment of the petitioner by the police officers.

ARGUMENT

I

The Petitioner Was Denied Due Process of Law, Guaranteed by the Fourth and Fourteenth Amendments of the Constitution of the United States, by the Receipt As Evidence of Various Alleged Gambling Paraphernalia, Seized from The Petitioner's Residence by Police Officers Without His Consent or Permission and Without the Existence or Possession of a Search Warrant.

The State of South Carolina strongly urges that the incriminating evidence was lawfully obtained from the defendant's residence. First, there was a valid consent to a search of the residence and, secondly, the officers made a valid search incident to a lawful arrest.

Although the petitioner has totally ignored the second ground, he contends that he was not advised of his constitutional rights and that the testimony as to his consent was simply not true. This is in spite of the fact that three (3) dedicated officers of the law swore that he did give his consent and their testimony was uncontradicted.

The only attack that the petitioner has made upon the State's right in this case to make a search incident to his arrest, is that there was no proper basis for issuing the arrest warrant in the first place. At no time before or during the trial did the petitioner contend that it was not a valid arrest. There was no objection to the form of the warrant by the defendant, but he apparently contends that the information given to the magistrate, who issued the warrant, could not have been sufficient. The testimony of Agent Owens with regard to his gambling activities with the defendant would be probable cause that the defendant was keeping a room or house with books or papers for the purpose of recording bets. This was the location of the telephone from which the defendant transacted his business. Further, Agent Owens testified as follows:

Tr. p. 10, *f.* 37:

A. I received information that Mr. Porter had gam-

> bling paraphernalia, and parlay cards in his possession at his dwelling home.

It is obvious that the magistrate felt that Agent Owens' personal knowledge and the other information that he had was sufficient to issue the warrant.

Since the defendant made no objection to the warrant until the close of the State's case, there was no opportunity for proving the sufficiency of probable cause, other than from the record. The State feels that the record reveals sufficient information for the issuance of the warrant.

Since the petitioner makes no particular attack upon the State's right to make a lawful search incident to an arrest, it would be futile to attempt to review all of the many State and federal decisions supporting this right of the State. In affirming the decision of the lower Court in this case, the South Carolina Supreme Court covered the basic question in their decision, *State v. Porter,* S. C. ; 162 S.E. 2d 843.

> He contends that, since the officers did not have a search warrant, the articles were obtained as a result of an unlawful search and were inadmissible under the rule announced in *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. (2d) 1081, 81 S. Ct. 1684.
>
> While the inquiry of the defendant as to a search warrant and his subsequent statement to the officers to go ahead and look around, amply support a finding, as contended by the State, that the defendant thereby consented to the search, we think there is another principle, assuming there was no consent, which makes the exclusionary rule in *Mapp* clearly inapplicable here. It was thus stated in the case of *State v. Swilling,* 249 S. C. 541, 155 S. E. (2d) 607, quoting from 47 Am. Jr., *Searches and Seizures,* Section 19 (Cumulative Supplement):
>
> When a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the ac-

cused for weapons or for the fruits of or implements used to commit the crime. The right to search and seize incident to a lawful arrest and without a warrant extends to things under the accused's immediate control and, to an extent depending on the circumstances of the case, to the place where he is arrested.

The articles in question were obtained without a search warrant, but incident to a lawful arrest, from the place where the defendant was arrested and where it was charged that the unlawful gambling activities were carried on. The house was under defendant's control and the search of the residence of defendant was not unlawful so as to make inadmissible the articles so obtained. *Harris v. United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399. There will be found an excellent annotation in 19 A.L.R. (3d) 727, in which recent cases are collected dealing with the validity of nonconsensual searches and seizures conducted without a search warrant following a lawful arrest.

Ker v. California, 374 U. S. 42, 10 L. E. (2) 743, 83 S. Ct. 1643, is among the most recent decisions supporting the position of the State.

II

The Petitioner Was Denied Due Process of Law, Guaranteed by the Fourth and Fourteenth Amendment to the Constitution of the United States, by the Receipt as Evidence of Statements Allegedly Made by the Petitioner at the Time of His Arrest, When It Was Admitted by the State of South Carolina That the Arresting Officers, at no Time, Advised Petitioner of His Right to Remain Silent and/or to Have Present an Attorney Prior to Questioning.

Immediately after having served the defendant with the arrest warrant, Sheriff's Lieutenant Coleman asked the defen-

dant if they could look around his home. His reply was "go ahead" or "help yourself". The State contends that the defendant was thereby consenting to search of his home. Defendant's counsel contend that this statement of the defendant was inadmissible in that it conflicts with the ruling of United States Supreme Court in the case of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2nd 694. First, the Miranda decision does not require that an officer advise the defendant of anything before asking permission to search his premises. The defendant's counsel have read something into this case that simply is not there. This fact has been borne out by several State decisions since the Miranda case was decided (June 13, 1966) and one of these is *People v. Chaddock*, 57 California Reporter 582. The California Court held that:

> There is no requirement in the law that an officer shall first advise a person of his constitutional rights and of his right to refuse to grant a consent to a search before the officer seeks a valid consent from the person to conduct a particular search. The mere asking of permission carries with it the implication that the person can withhold permission for such an entry or search.

This is a very logical statement and is supported by what happened in the instant case. The first thing that the defendant said to the officers was to ask if they had a search warrant (Tr. p. 28, f. 111). This question showed conclusively that the defendant knew that he ordinarily would have the right to refuse a search. Perhaps he was well enough acquainted with the law to know that officers have the right to make a reasonable search incident to an arrest.

III

The Petitioner Was Denied Due Process of Law and Equal Protection of the Law, Guaranteed by the Fourteenth Amendment to the Constitution of the United States by the Failure of the Trial Judge to Charge the Jury the Law Relative to Entrapment, When There Has Been Entrapment of the Petitioner by the Police Officers.

The record in this case does not contain any testimony which would have warranted the Trial Judge in charging the jury the law of entrapment. In his brief, the defendant contends that Agent Owens persuaded the defendant to accept a bet. This is not substantiated by the testimony. In fact, Agent Owens swore that he did not urge the defendant to accept the bet (Tr. p. 17, f. 66). It is only reasonable that the defendant, who did not know Agent Owens, would prefer to call Agent Owens back at an unsuspicious telephone number before engaging in this activity.

In *State v. Jacobs*, 238 S. C. 234, 119 S. E. 2d 735, that Court held that, "Entrapment is the conception and planning of an offense by an officer, and is procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer".

This case is also authority for the fact that merely affording an opportunity for the commission of the offense does not constitute entrapment. Agent Owens only made the initial offer and testimony shows that the defendant set the odds and detailed all arrangements for executing the bets. The Trial Judge properly refused to charge the law of entrapment.

CONCLUSION

All questions presented herein have been previously denied by the United States Supreme Court and the trial was conducted in accordance therewith and the State Appellate Court has already considered these questions, enlightened by the most recent federal decisions. Therefore, the State of South Carolina would respectfully urge that this Petition for a Writ of Certiorari be denied on the grounds as set forth above.

Respectfully submitted,

B. O. Thomason, Jr., *Solicitor*
Thirteenth Judicial Circuit
State of South Carolina
Room 305, Court House
Greenville, S. C. 29601

H. F. Partee
Assistant Solicitor
Room 304, Court House
Greenville, S. C. 29601
Attorneys for Respondent